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Dear Senators

We are pleased to make this submission on the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (the Amending Bill).

Submitted by:

- Professor Rosemary Lyster, Professor of Climate and Environmental Law, The University of Sydney Law School, Co-Leader of the Climate Disaster and Adaptation Cluster, Sydney Environment Institute
- Professor Danielle Celermajer, *Professor* of Sociology and Criminology, Deputy Director of the Sydney Environment Institute, The University of Sydney.

<u>Summary of the submission</u>

We support the enactment of the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (the Amending Bill). The Australian government has long-standing international domestic commitments to achieve intergenerational equity. The climate crisis necessitates that Federal government decision-makers consider, under the nominated legislation, the climate change impacts of their administrative decisions on 'the health and wellbeing of current and future children in Australia'. We do not believe that it is necessary for the tort notion of 'duty of care' to be included in the Amending Bill. We submit that the imposition of duties on administrative decision-makers, as provided for in the Amending Bill, achieve the objects of the Bill. If a novel 'duty of care' is to be imposed on decision-makers this should be included as a mandatory consideration in the Amending Bill. At present, other than its mention in the title of the Amending Bill, it is not mentioned in any other provision of the Bill.

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1. Intergenerational equity and the duty of the Australian Federal government

In 1992, the United Nations Conference on Environment and Development (the Rio Conference) was a landmark in the development of sustainable development. The purpose of the Conference was to formulate strategies to achieve 'sustainable development'[1] worldwide.

- *Australia is a signatory to the Rio Declaration on Environment and Development* (the Rio Declaration)

The *Rio Declaration*[2] encapsulates the key agreements reached by the international community in its goal of achieving sustainable development. Perhaps the most influential principles of the Declaration *are* the principles of intergenerational equity, the precautionary principle and the polluter-pays principle. Intergenerational equity requires current rates of development to equitably meet the development and environmental needs of present and future generations (Principle 3). The precautionary approach is that, 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation' (Principle 15). Finally, the polluter-pays principle envisages the 'internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution' (Principle 16).

Comment: we submit that these principles are inseparable. International equity cannot be achieved unless the precautionary principle is adhered to, and the polluter, including corporations which mine fossil fuels, bears the cost of their pollution. In the context of the escalating climate crisis, in May 2021,

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[1] 'Sustainable development' was defined in *Our Common Future* (1987 Report to the UN General Assembly by the World Commission on Environment and Development) as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.

[2] Available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> (accessed 6 November 2023)

the International Energy Agency[3] **said that if governments are serious about their Net Zero by 2050 commitments, there can be no new investments in oil, gas and coal, as from 2021.**

Consequently, the Amending Bill is consistent with the Australian government's commitments under the *Rio Declaration* and the IEA's finding.

- *The Sustainable Development Goals*

In 2012, the UN Conference on Sustainable Development, known as the Rio+ 20 Conference, was held to assess progress, identify gaps and recommit to implementing strategies for sustainable development. The Conference resulted in a non-binding outcome document, *The Future We Want*, which contains practical measures for implementing sustainable development goals. Guidelines were adopted for green economy policies and a decision was taken to develop Sustainable Development Goals (SDGs) building on the Millennium Development Goals.[4] The 2015 SDGs[5] recognise, inter alia, that promoting sustainable patterns of consumption and production, and protecting and managing the natural resource base of economic and social development are intrinsic to sustainable development. The principles of justice, equity and inclusion are to benefit children, youth and future generations without discrimination of any kind. There are 17 SDGs, each of which is accompanied by a number of Goals. For present purposes, we identify the following SDGs as directly relevant: ensuring health (SDG 3); adopting modern energy systems (SDG 7); taking urgent action to combat climate change and its impacts (SDG 13); and, making cities and human settlements safe, resilient and sustainable (SDG 11). Further from an environmental perspective, the oceans and marine resources must be conserved through sustainable utilisation (SDG 14), while terrestrial ecosystems should be protected, restored and sustainably utilised

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[3] See *Net Zero by 2050: A Roadmap for the Global Energy Sector* (International Energy Agency: 2021) available at <https://www.iea.org/reports/net-zero-by-2050> (accessed 6 November 2023).

[4] See <http://www.un.org/en/sustainablefuture/> (accessed 22 November 2023).

[5] See <https://sustainabledevelopment.un.org/?menu=1300> (accessed 22 November 2023).

(SDG 15). Forests must be sustainably managed, desertification combated, and land and biodiversity loss halted and reversed (SDG 15).

Comment: the Australian government is a signatory to the SDGs. All of the SDGs mentioned above are relevant to Federal government decision-makers in considering the health and wellbeing of, including the impacts of climate change on, Australian children and all future generations. Consequently, the Amending Bill is consistent with these commitments.

- *Ecologically Sustainable Development – the duty on the Australian Federal government*

In December 1992, six months after UNCED, each tier of government in Australia adopted the *National Strategy for Ecologically Sustainable Development.* The inclusion of the prefix 'ecologically' before the term 'sustainable development' was an important Australian innovation. The National Strategy committed all levels of Australian government to the promotion of 'development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends'. The precautionary principle is generally expressed as a key component of ecologically sustainable development and has been incorporated as part of the national policy on the environment. As discussed above, intergenerational equity is a key principle of sustainable development.

Comment: we submit that the Federal government has committed itself through the National Strategy to achieve ecologically sustainable development including intergenerational equity.

2. The *Intergovernmental Agreement on the Environment* (IGAE) and the duty of the Australian Federal government

The IGAE, which is an Agreement between the Federal, State and Territory governments, provides that:

SECTION 3 PRINCIPLES OF ENVIRONMENTAL POLICY

3.1 The parties agree that the development and implementation of environmental policy and programs **by all levels of Government should be guided by the following considerations and principles**.

3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for **ecologically sustainable development**, will benefit both the Australian people and environment, and the international community and environment. This requires the effective integration of economic and environmental considerations in decision making processes, in order to improve community well-being and **to benefit future generations**.

3.3 The parties consider that strong, growing and diversified economies (**committed to the principles of ecologically sustainable development**) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner.

3.4 Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things: 1. ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision-making process; 2. ensuring that there is a proper examination of matters which significantly affect the environment; and 3. ensuring that measures adopted should be cost effective and not be disproportionate to the significance of the environmental problems being addressed.

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 **precautionary principle** Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by: 1. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and 2. an assessment of the risk weighted consequences of various options.

3.5.2 **intergenerational equity** the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 **conservation of biological diversity and ecological integrity** **conservation of biological diversity and ecological integrity** should be a fundamental consideration.

3.5.4 improved valuation, pricing and incentive mechanisms environmental factors should be included in the valuation of assets and services. **polluter pays** i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

Comment: we submit that the Australian government's ratification of the *Rio Declaration*, the *National Strategy on Ecologically Sustainable Development* and the *Intergovernmental Agreement on the Environment* each and together place an obligation on Federal government decision-makers to take intergenerational equity into account when making decisions under the legislation identified in the Amending Bill. This is particularly so given the current climate and biodiversity crises. In other words, we submit that the Amending Bill simply incorporates into legislation the obligations of the Australian government since 1992.

2. The *Paris Agreement* and the duty of the Australian Federal government

The Australian government is a signatory to the Paris Agreement and has submitted its nationally determined contribution under the Agreement. The Preamble to the Agreement states that:

> 'Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect,

promote and consider their respective obligations on human rights, the right to health, … and **intergenerational equity**'.

Comment: we submit that the Australian Federal government has ratified the *Paris Agreement* and has agreed that it should 'respect, promote and consider intergenerational equity'. We submit that this includes with respect to Federal government decision-making under the legislation identified in the Amending Bill (see below).

3. Ecologically sustainable development principles in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the EPBCA)

3A Principles of ecologically sustainable development

The following principles are ***principles of ecologically sustainable development***:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced **for the benefit of future generations**;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

Comment: section 3A(c) states that 'the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations'. This duty rests on Federal

government decision-makers as members of the 'present generation'. There is nothing in the Bill which excludes decision-makers from ensuring the obligation contained in section 3A(c).

We submit that the duty rests on the Federal government decision-makers making decisions under the EPBCA and the legislation identified in the Amending Bill (see below).

5. The *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (the Amending Bill)

5.1 Section 3 Objects of the Act Add:

and (d) **to promote intergenerational equity** by requiring the health and wellbeing of current and future children in Australia to be considered by persons making certain administrative decisions that are likely to contribute to climate change.

Comment: This is an important addition to the existing framework, as the court looks to the objects, scope and purpose of the Act to interpret whether a decision-maker has acted lawfully or unlawfully in judicial review proceedings. For example, judges refer to objects in determining whether a decision-maker has taken into account all relevant considerations and has not taken into account any irrelevant ones (*Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24).

We agree with the addition of this object in the *Climate Change Act 2022 (Cth)*.

3.2 Section 4 Administrative decisions statutory duties Add: persons making certain administrative decisions likely to contribute to climate change (called 'significant decisions') have statutory duties to consider the health and wellbeing of current and future children in Australia.

- Section 5 Definitions

child means an individual who has not reached 18 years.

health and wellbeing includes the following:

(a) emotional health and wellbeing; (b) cultural health and wellbeing; (c) spiritual health and wellbeing.

relevant enactment (in other words Acts to which these amendments will apply) means the following: (a) the *Environment Protection and Biodiversity Conservation Act 1999*; (b) the *Export Finance and Insurance Corporation Act 1991*; (c) the *Infrastructure Australia Act 2008*; (d) the *National Reconstruction Fund Corporation Act 2023*; (e) the *Northern Australia Infrastructure Facility Act 2016*; (f) the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*; (g) an instrument made under an Act mentioned in any of the above paragraphs; (h) any other Act or instrument prescribed by the rules for the purposes of this paragraph.

Comment: this addition gives the amending Bill an appropriately broad reach covering all Commonwealth legislation relevant to the making of decisions about coal, gas and petroleum developments including Environmental Impact Assessment, biodiversity impacts, EFIC (government underwriting export/import finance), the 2023 $15 billion National Reconstruction Fund for advanced manufacturing in Australia, carbon capture and storage (CCS) offshore in Commonwealth waters (Note: States have passed mirror legislation for CCS onshore), and all regulations made under these Acts.

We agree with the scope and coverage of the amendment as we see it as necessary to capture the scope of relevant decisions consistent with the principles, obligations and risks set out above.

5.3 *scope 2 emission of greenhouse gas* has the same meaning as in the National Greenhouse and Energy Reporting Act 2007. (Note: this means 'indirect emissions produced to generate the power used by a company')

scope 3 emission of greenhouse gas, in relation to a facility, means the release of greenhouse gas (other than scope 1 emissions or scope 2 emissions of greenhouse gas) into the atmosphere: (a) as a result of an activity, or series of activities (including ancillary activities), of the facility, whether the activity, or series of activities, form part of the facility or not; but (b) from sources that are not owned or controlled by the facility. Example: Scope 3 emissions include upstream emissions, downstream emissions, end-use consumption emissions as well as exported emissions occurring outside of Australia.

The following are examples of scope 3 emissions: (a) the release of greenhouse gas from the extraction or production of materials purchased by a facility; (b) the release of greenhouse gas from the transportation of fuels purchased by a facility; (c) the release of greenhouse gas from the use of products and services sold by a facility.

Comment: the obvious implication of this is that the decision-maker is legally required to consider the burning of coal, oil and gas in the jurisdictions to which Australia's fossil fuels are exported. Upon judicial review, the Federal Court has consistently refused to accept this argument but the NSW Land and Environmental Court has incorporated it in deciding whether coal mining, and the burning of that coal in third countries, is in the 'public interest' (*Gray v Minister for Planning* 2006 132 LGERA 258). This provision requires the Federal Court to consider the consequences of the burning of fossil fuels in overseas jurisdictions.

We agree that Scope 1, 2 and 3 emissions should be considered by the decision-maker and consequently the Federal Court upon review. The failure to include scope 3 emissions, in particular, undermines respect for the principles and obligations set out above.

significant decision has the meaning given by subsections 15C(1) 6 and (2) (see below).

5.4 Part 4A is inserted into the Act—Duty to consider the health and wellbeing of children in Australia when making decisions contributing to climate change

15B Simplified outline of this Part

• A person has **a statutory duty to consider** the health and wellbeing of current and future children in Australia when making certain administrative decisions contributing to climate change (called 'significant decisions').

• A person also has **a statutory duty not to make a significant decision** in relation to the exploration or extraction of coal, oil or natural gas if the likely emission of greenhouse gases as a result of the decision poses a material risk of harm to the health and wellbeing of current and future children in Australia.

• The *Administrative Decisions (Judicial Review) Act 1977* (the ADJR) is modified, including to provide for judicial review of significant decisions and to extend standing for judicial review of significant decisions under that Act.

Comment: the obvious implication of this section is that, upon judicial review, a breach of these provisions results in unlawfulness on the part of the decision-maker for failing to take into account a mandatory relevant consideration (*Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24).

5.5 *15C Meaning of 'significant decision'* (Note: for this section see 'relevant enactment' definition above for scope of this section)

(1) A *significant decision* means a decision:
(a) of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not) under a relevant enactment or a part of a relevant enactment; and
(b) that is likely to result directly or indirectly, over the lifetime of one or more facilities, in the emission of greenhouse gases that: (i) are scope 1 emissions, scope 2 emissions or scope 3 emissions; and (ii) have a carbon dioxide equivalence of at least 100,000 tonnes (gross).

Comment: this is the quantity of GHGs 'trigger' for a decision to be a 'significant decision'.

(2) A *significant decision* also means a decision: **(Note: this section applies the above 'trigger' to all of the legislation mentioned below)**

(a) of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not):
(i) in the performance of a function, or the exercise of a power, that is required, or expressly or implied authorised, under an Act or instrument, or a part of an Act or instrument, covered by subsection (3); and
(ii) whether the decision derives its capacity to affect legal rights or obligations from the Act or instrument, or a part of the Act or instrument, covered by subsection (3) or not; and

(b) that is likely to result directly or indirectly, over the lifetime of one or more facilities, in the emission of greenhouse gases 3 that: (i) are scope 1 emissions, scope 2 emissions or scope 3 emissions; and (ii) have a carbon dioxide equivalence of at least 100,000 tonnes (gross).
Example 1: A decision of the National Reconstruction Fund Corporation to provide a loan in the performance of the corporation's investment functions under the National Reconstruction Fund Corporation Act 2023 and that is likely to result (whether directly or indirectly) in the emission of greenhouse gases as described in paragraph (b) is a significant decision within the meaning of this subsection.
Example 2: A decision of the Northern Australia Infrastructure Facility to provide a grant of financial assistance in the performance of the facility's functions under the *Northern Australia Infrastructure Facility Act 2016* and that is likely to result (whether directly or indirectly) in the emission of greenhouse gases as described in paragraph (b) is a significant decision within the meaning of this subsection.

(3) The following are covered by this subsection: (a) the *Export Finance and Insurance Corporation Act 1991*; (b) the *Infrastructure Australia Act 2008*; (c) the *National Reconstruction Fund Corporation Act 2023*; (d) the *Northern Australia Infrastructure Facility Act 2016*; (e) an instrument made under an Act mentioned in any of the above paragraphs; (f) any other Act or instrument prescribed by the rules for the purposes of this paragraph.

Comment: in summary the emission of 100,000 tonnes of CO_2 equivalent 'triggers' all of the below when making a statutorily defined 'significant decision'.

5.6 *15D Duty to consider the health and wellbeing of children in 30 Australia when making 'significant decisions'*

(1) A person who proposes to make, or is required to make, a significant decision **must consider** (in addition to any other matters the person is required to consider under any other law of the Commonwealth):
(a) the likely impacts of the likely emission of greenhouse gases, as a direct or indirect result of the decision, on the health and wellbeing of current and future children in Australia; and
(b) the health and wellbeing of current and future children in Australia as the paramount consideration.

Comment: the words 'paramount consideration' are legally significant as in judicial review proceedings the courts always leave the weighting of factors to the decision-maker – as long as the decision-maker has considered all of the relevant factors and has not taken any irrelevant factors into account (*Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24). This preserves the doctrine of separation of powers. Here the legislator – i.o.w. the Parliament - orders the decision-maker to rank health and wellbeing as the most important factor. This then becomes a mandatory consideration, the breach of which amounts to unlawfulness and the decision is set aside by the court.

(2)Without limiting the matters that the person may take into account in considering the likely impacts of the likely emission of greenhouse gases, as a direct or indirect result of the decision, on the health and wellbeing of current and future children in Australia, the person **must take into account** the following:

(a) the extent to which the likely emission of greenhouse gases, as a direct or indirect

result of the decision, will prejudice the achievement of the following: (i) Australia's greenhouse gas emissions reduction targets; (ii) the greenhouse gas emissions reduction targets included in Australia's nationally determined contribution;

(b) the likely impacts of climate change on the health and wellbeing of current and future children in Australia, having regard to: (i) if the IPCC has published information about the impacts of climate change—information about the impacts of climate change that was most recently published by the IPCC; or (ii) otherwise—the best available scientific knowledge of the impacts of climate change;

(c) any other matters prescribed by the rules for the purposes of this paragraph.

Comment: the word 'must' in the above provisions makes this a mandatory relevant consideration and failure to take these factors into account results in unlawfulness and the decision will be set aside. Section 15D(2)'Without limiting the matters that the person may take into account' is legally significant since even where the legislation stipulates mandatory relevant considerations, the reviewing court is not limited to those. The court can add considerations which a decision-maker is legally bound to consider by referring to the objects, scope and purpose of the Act ((*Minister for Aboriginal Affairs v Peko Wallsend* 162 CLR 24).

(3) This section has effect despite any other law of the Commonwealth, whether enacted before or after the commencement of this section.

Comment: any other Commonwealth law cannot limit the matters the person is required or permitted to consider in making the 'significant decision'.

5.7 *15E Duty not to make certain significant decisions that pose a material risk of harm to the health and wellbeing of children in Australia*

(1) A person **must not** make a significant decision if:

(a) the likely emission of greenhouse gases, as a direct or indirect result of the decision, poses a material risk of harm to the health and wellbeing of current or future children in Australia; and
(b) the decision is in relation to, or would provide direct or indirect assistance for, one or more of the following:
(i) activities that involve the exploration of coal, oil or natural gas;
(ii) activities that involve the extraction of coal, oil or 14 natural gas;
(iii) any other activities prescribed by the rules for the 16 purposes of this subparagraph.

(2) Without limiting the matters that the person may take into account in determining whether the likely emission of greenhouse gases, as a direct or indirect result of the decision, poses such a risk, the person **must** take into account the following:

(a) the extent to which the likely emission of greenhouse gases, as a direct or indirect result of the decision, will prejudice the achievement of the following:
(i) Australia's greenhouse gas emissions reduction targets;
(ii) the greenhouse gas emissions reduction targets included in Australia's nationally determined contribution;

(b) the likely impacts of climate change on the health and wellbeing of current and future children in Australia, having regard to:
(i) if the IPCC has published information about the impacts of climate change—information about the impacts of climate change that was most recently published by the IPCC; or
(ii) otherwise—the best available scientific knowledge of the impacts of climate change;

(c) any other matters prescribed by the rules for the purposes of this paragraph.

(3) This section has effect despite any other law of the Commonwealth, whether enacted before or after the commencement of this section.

Comment: Section 15E(2) sets out the mandatory relevant considerations which if not taken into account will result in unlawfulness. But note that this does not limit what the decision-maker must take into account. As discussed above, the judges have the discretion to add to the list of mandatory relevant considerations whatever they think should be taken into account – by looking at the 'objects, scope and purpose' of the Act (see above). The other effect of this subsection is that a person is required to not make a significant decision in the circumstances mentioned in subsection (1) despite any other law of the Commonwealth that requires the person to make the 'significant decision'.

There is a further point to be made about this section by identifying the word 'if' at the end of s. 15E(1). The word 'if' has been found by the courts to establish an objective jurisdictional fact in the legislation. In other words, although the courts do not usually correct a decision-maker's findings of fact, they will do so if certain facts must exist before a decision-maker can exercise power/jurisdiction under the Act. So, for example, the court can establish objectively for itself whether the facts in s. 15E(1)(a) and (b) exist. If they do, the decision must not be made and the court's determination of whether the necessary facts exist overrides that of the decision-maker's. If a decision is made it will be declared unlawful and void for going beyond the powers/jurisdiction granted in the Act (*Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55).

5.8 *15F Modification of the Administrative Decisions (Judicial Review) 9 Act 1977—extended standing for judicial review*

(1) This section extends (and does not limit) the meaning of the term 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* for the purposes of the application of that Act in relation to:

(a) a decision made that is a significant decision; or
(b) a failure to make a decision that is a significant decision; or
(c) conduct engaged in for the purpose of making a decision that is a significant decision.

(2) An individual is taken to be a person aggrieved by the decision, failure or conduct if the individual is a child who is an Australian citizen or ordinarily resident in Australia or an external Territory.

Comment: this is a very important provision. Children's standing has been the subject of constitutional litigation for decades (see for example the granting of standing by the Philippines Supreme Court in *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (1993)), and most recently in *Juliana v the United States* in the United States. This is because children are not legal persons and do not have standing at common law. It is a common litigation tactic to argue against the applicants' standing so the court is prevented from hearing or determining the merits of the case. Section 15F(2) grants children statutory standing without it having to be argued.

We agree that children should be given statutory standing to enforce their rights of intergenerational equity. However, we add a cautionary note. It is a well-known consequence of litigation that the 'costs follow the event'. In other words, where the litigant's application for judicial review is unsuccessful, the litigant is liable to pay its own costs and that of the defendant. Although the High Court has accepted that where a matter is brought 'in the public interest', the reviewing court has the discretion to vary this rule and not award costs in this way (*Oshlack v Richmond River Council* [1998] 193 CLR 72), there is a risk that costs might be awarded against the children litigants.

5.9 *15G Modification of the Administrative Decisions (Judicial Review) Act 1977—decisions subject to judicial review*

(1) This section extends (and does not limit) the meaning of the term 'decision' to which this Act applies in the *Administrative Decisions (Judicial Review) Act 1977* for the purposes of the application of that Act in relation to:

(a) a decision made that is a significant decision; or
(b) a failure to make a decision that is a significant decision; or

(c) conduct engaged in for the purpose of making a decision that is a significant decision.

(3) A decision to which this Act applies is taken to include a significant decision.

Comment: this provision confirms that a 'significant decision' is reviewable as a 'decision' under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (ADJR Act). This is important as if it is not a 'decision' then judicial review occurs under the common law instead of the ADJR Act which has some implications which are not necessary to recite for present purposes.

5.10 *15H Modification of the Administrative Decisions (Judicial Review) Act 1977—reasons may be obtained for significant decisions*

(1) This section extends (and does not limit) the meaning of the term decision to which this section applies in section 13 of the *Administrative Decisions (Judicial Review) Act 1977* for the purposes of the application of that Act in relation to:

(a) a decision made that is a significant decision; or
(b) a failure to make a decision that is a significant decision; or
(c) conduct engaged in for the purpose of making a decision that is a significant decision.

(2) Despite paragraph (zb) of Schedule 2 to the *Administrative Decisions (Judicial Review) Act 1977*, a decision to which this section applies is taken to include a decision relating to the activities of the Export Finance and Insurance Corporation under Part 4 or 5 of the *Export Finance and Insurance Corporation Act 1991* if the decision is a significant decision.

Comment: this is a very important provision as there is no right to receive reasons for an administrative decision under the common law. Section 13 of the ADJR Act gives a person affected by a decision the right to request the decision-maker to provide a written statement of reasons after the decision has been made. This provides essential information for the bringing of a

judicial review application and – in theory at least – has an instrumental value in putting decision-makers on notice that they may have to justify their decisions in writing after the fact.

5.11 At the end of section 16 Add:

• The Minister can make rules for the purposes of this Act.

6 At the end of Part 5 Add:

Rules (1) The Minister may, by legislative instrument, make rules prescribing matters:
(a) required or permitted by this Act to be prescribed by the rules; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) To avoid doubt, the rules may not do the following:

(a) create an offence or civil penalty;
(b) provide powers of:
(i) arrest or detention; or
(ii) entry, search or seizure;
(c) impose a tax;
(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
(e) directly amend the text of this Act.

Comment: this provision is a standard provision whereby the legislation gives the Minister - i.o.w. the Executive - the power to fill in the details of the Act by way of regulations. The words 'necessary or convenient' are legally relevant as they mean that the Minister must not use regulations to try to extend the scope of the Act but must only make regulations that are ancillary to the Act (*Shanahan v Scott* 96 CLR 245). Regulations can also be challenged as unlawful under judicial review proceedings.

6. The duty of care, *Sharma* and the Amending Act

It is clear that the title of the Amending Act relies on the contested question of whether Federal government decision-makers have a 'duty of care' when exercising their powers under legislation. This arose in *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560. In that case, the eight children who bought the case attempted to establish a novel 'duty of care' in negligence contending that the projected effects of climate change on their morbidity and mortality constituted "social matters", so obliging the Minister to take them into account when making determinations about fossil fuel extractive projects. They argued that 'a reasonable person' in the Minister's position could foresee that a risk of injury to the children "would flow from the contribution to increased atmospheric CO_2 and consequent increased global average surface temperature brought about by the combustion of the coal, which the Minister's approval would facilitate". Consequently, she bears a duty of care to them and other Australian children.[6]

In refuting this contention, the Minister mounted several arguments concerning what she framed as a weak and diffuse connection between her decision to approve or withhold approval for a coalmine extension and the harms the children may suffer in the future. She argued that the "foreseeability of harm" from her conduct "was causally negated by the complex interaction of factors that will evolve over the coming decades". Further, "[e]ach step in the causal chain of events relied upon by the applicants to connect [her] conduct to the harm alleged was a contingency and ... the possibility of that contingency not occurring denied the foreseeability of the harm."[7]

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[6] *Sharma v Minister for the Environment* [2021] FCA 560, at [247]. Hereafter *Sharma 1*.

[7] *Sharma 1*, at [194]. Further, as recounted on appeal, it was argued that she had "little, if any, control over the risk of death and personal injury from heatwaves or bushfires that may be caused by climate change"; that "the extent to which that risk can be mitigated or eliminated depends on many different actions or factors, including the extent of co-ordinated global action to address climate change over the coming years and decades", and; that "the risk of harm relied upon by [the children] will not be a product of the Minister's conduct in approving the extension project per se, but the accumulation of atmospheric CO_2 from all sources." *Sharma v Minister for the Environment* [2022] FCAFC 35, at [651-4]. Hereafter *Sharma 2*.

While Bromberg J, at first instance, found that the Minister did have a 'duty of care', on appeal, the three justices of the Full Bench of the Federal Court disagreed with Bromberg J's reasoning and quashed the decision. Each reasoned in different ways, but they variously drew on arguments that the Minister had insufficient control over the projected harm, that sufficient closeness and directness between the Minister and the Australian children was lacking, that the class to which such a duty would be owed was indeterminate,[8] and that it was not foreseeable that approval of the mine extension in question would cause harm to the children. Their worries also included concerns over authority, specifically the appropriateness of the judiciary intervening in matters that (it was argued) properly fell within the authority of the legislative branch.[9]

Notwithstanding his rejection of the argument that the Minister bore a 'duty of care' to the children, Justice Beach expressed some unease about the capacity of the concepts to which he saw himself bound to address the situation before him. He pointed out that his decision had been made on the basis of concepts operant in the common law such as "sufficient closeness and directness" and "indeterminacy"; concepts which, he argued, "in their present form may have reached their shelf life, particularly where one is dealing with acts or omissions that have wide-scale consequences that transcend confined temporal boundaries and geographic ranges, and where more than direct mechanistic causal pathways are involved."[10] Nevertheless, he held that it was not within the authority of the Court on which he sat to modify the concepts, or as he put it, to "engineer new seed varieties for sustainable duties of care".

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[8] As per Beach J., "Liability cannot hold where the class affected is indeterminate, where this is defined as "Indeterminacy is the quality of something which is not fixed in its parameters or is uncertain in extent or character". *Sharma 2*, at [713].

[9] As per Wheelan J, "Their resolution is uniquely suited to elected representatives and executive government responsible for law-making and policy-making. The issues inevitably slide into political considerations, and require the making of value judgments...How is a court to evaluate the reasonableness of one view over another in this political and policy context? These questions point to the conclusion to which Gleeson CJ referred in *Graham Barclay Oysters* at [6], namely that they raise issues that are inappropriate for judicial resolution." *Sharma 2*, at [868].

[10] *Sharma 2*, at [754]

As the decision on appeal in *Sharma* demonstrates, the theories of responsibility that currently shape judicial reasoning concerning 'duty of care' are ill suited to deal with the complex nature of causality and responsibility operant in relation to fossil fuel emissions and the impacts of climate change. In the literature on climate change, it is now well established that standard theories of responsibility, that require that the act in question and the effects be proximate and clearly related are completely inadequate to deal with the long and complex causal chains involved in producing devastating impacts on health and wellbeing.

Comment: One view is that the Amending Bill seeks, appropriately, to ensure that the 'duty of care' is interpreted in a manner that is sufficient to the complex causal logic involved in producing the impacts of climate change, across long time frames. It effectively brings the law up-to-date with, or adjusts it to, the clear ecological realities in which it is now operating.

However, in our view the incorporation of this duty in the title of the Amending Bill muddies the waters of what is otherwise the imposition of clear duties, in the Administrative Law sense, on Federal decision- makers. These duties have been discussed extensively above. Furthermore, other than a reference to a 'duty of care' in the title of the Amending Bill it is not mentioned anywhere else. If the Parliament wishes to establish this 'duty of care' it must do so explicitly by making it a mandatory relevant consideration for decision-makers.

Conclusion

We have made detailed submissions on each provision of the Amending Bill.

We support the enactment of the *Climate Change Amendment (Duty of Care and Intergenerational Climate Equity) Bill 2023* (the Amending Bill). The Australian government has long-standing international and domestic commitments to achieve intergenerational equity. The climate crisis necessitates that Federal government decision-makers consider, under the legislation identified in the Bill, the climate change impacts of their administrative decisions, especially on 'the health and wellbeing of current and future children in Australia'. We do not believe that it is

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necessary for the tort notion of ‘duty of care’ to be included in the Amending Bill. We submit that the imposition of duties on administrative decision-makers as provided for in the Amending Bill achieve the objects of the Bill. If a novel ‘duty of care’ is to be imposed on decision-makers, this should be included as a mandatory consideration in the Amending Bill. At present, other than its mention in the title of the Amending Bill, it is not mentioned in any provisions of the Bill.

Consultation

We note that in the course of developing our submission we have consulted with Associate Professor Andrew Edgar, Administrative Law Program Coordinator, The University of Sydney Law and we thank him for his comments.

Your sincerely

Professor Rosemary Lyster and Professor Danielle Celermajer